



November 27, 2019

Senator Robert Starr
Chair Legislative Study Committee on Wetlands
Via E-Mail

RE: VNRC Testimony and Attachments

Dear Chair Starr:

Attached is a copy of the written testimony that I delivered on behalf of the Vermont Natural Resources Council (VNRC) at the hearing held by the Legislative Study Committee (Committee) on Wetlands on October 9th, records that I obtained from ANR that address the meaning of language added to H.525 in Conference Committee and an index to these records.

Please include these documents in the record of the Committee's work.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Groveman", is written over a long horizontal line that extends across the page.

Jon Groveman
Policy and Water Program Director

**Testimony of Jon Groveman
Vermont Natural Resources Council
Policy and Water Program Director
Before the Vermont Legislative Committee on Wetlands
October 9, 2019**

Introduction

Thank you for the opportunity to testify today on this very important topic. My name is Jon Groveman. I am the Policy and Water Program Director for the Vermont Natural Resources Council (VNRC). I will use my time this morning to address the following issues:

- 1 - The ecological importance of wetlands and the no net loss of wetlands policy.
- 2 - A brief history of wetland regulation in Vermont.
- 3 - Comments on the Vermont Agency of Natural Resources' (ANR) proposed changes to wetland law in Vermont.
- 4 - Comments on the language that was added to H.525 in Conference Committee regarding the Agency of Agriculture Food and Markets (AAFV) amending the Required Agricultural Practices (RAPs) to regulate wetlands not regulated by ANR.

Experience Working on Wetland Issues

As context for my testimony, I have been working professionally on wetland related issues in Vermont since 1995. First as an ANR attorney where I provided legal advice related to wetland regulation and litigating appeals of wetland permit decisions issued by ANR. Then as Executive Director of the former Water Resources Board (WRB) where I oversaw the administration of the Vermont Wetland Rules (VWR), assisted the WRB in hearing appeals of wetland permitting decisions and in processing petitions to reclassify wetlands. Finally, as part of my work at VNRC I have participated in two efforts led by state government to revise Vermont's wetland laws – one in 2007 and 2008 that resulted in the shifting of responsibility over the wetland rules from the Water Resources Panel to ANR and allowed ANR to designate wetlands as jurisdictional in Vermont based on an ecological evaluation of wetland function and values. Act 31 of 2009 implemented these changes. The other review began in 2017 has been led by ANR and has not resulted in consensus recommendations to alter Vermont's wetland program. I also have been involved with the designation of two Class I wetlands in Vermont.

Ecological Importance of Wetlands and No Net Loss of Wetlands Policy

The ecological importance of wetlands cannot be overstated. I agree with everything that Phil Huffman from the Nature Conservancy said about the vital functions and values that wetlands provide for the environment in his written and oral testimony to the Committee. Rather than

reiterate Mr. Huffman's testimony, I would like to focus on the no net loss of wetlands functions policy that is in Vermont and federal law.

It is important to note that we have lost thousands of acres of wetlands in Vermont since the 18th century. This represents between 35%-50% of the wetlands in Vermont.

This is consistent with what we as a nation have experienced in terms of wetland loss. It is this loss of wetland functions and values that led President George H.W. Bush to adopt the not net loss of wetlands policy in 1989. It was also around this time that the State of Vermont adopted its wetlands program with the same goal of no net loss of wetlands.

We have made progress in Vermont slowing the destruction of wetlands since the late 1980s. However, we have by no means stopped the loss of wetlands, nor made up for the significant wetland loss we have experienced in Vermont and across the country.

One of our concerns about the proposals to alter Vermont's wetland program proposed by ANR and AAFM is that it would weaken wetland protections in Vermont. We do not believe weakening the wetland rules by diminishing ANR's jurisdiction over wetlands, which is what both the ANR and AAFM's proposals would do, is consistent with Vermont's no net loss of wetlands policy.

Wetland Regulation in Vermont and ANR's Proposal

In order to decide whether to amend the rules for determining jurisdiction over wetlands in Vermont it is vital to understand how wetland jurisdiction is determined today. Since the VWRs were adopted in 1990, jurisdiction over wetlands in Vermont has been determined by the following factors: 1) whether a wetland is on Vermont's National Wetland Inventory (NWI) wetland maps; 2) whether a wetland is contiguous to a wetland on the NWI maps; and 3) whether a wetland is significant for one of the functions and values listed in VWRs such that the wetland should be jurisdictional under Vermont law. A jurisdictional wetland that is not designated as Class I is a Class II wetland. Class III wetlands are wetlands that are not Class II or I – they are not mapped or found to be significant for any wetland functions and values.

In 2009, the Legislature altered wetland jurisdiction by transferring authority to amend the VWRs from the Water Resources Panel (WRP) (the successor to the WRB following "permit reform" legislation was enacted in 2004) to ANR and transferring authority to designate Class II wetlands from the WRP to ANR. In doing so, the intent was to make it easier for ANR to designate wetlands that provide significant functions and values without going through a formal process at the WRP. Under the new system, ANR could evaluate a wetland on-site and issue a short, written determination to a landowner setting forth the basis for designating a wetland as Class II.

These changes were the result of years of negotiation between environmental groups, business interests and ANR. It is extremely frustrating that now ANR is proposing to eliminate the

process of determining jurisdiction based on wetland functions and values. ANR proposes to replace the current system of determining jurisdiction with a system that determines jurisdiction based on the size of a wetland (more than ½ acre), the proximity of a wetland to waterbodies, or the characteristics of wetlands, such as whether a wetland contains rare threatened or endangered species, state significant natural communities or peet.

As I have already noted, there is no question that moving from protecting wetlands based on functions and values to factors such as size or other features will reduce oversight over wetlands in Vermont. ANR's proposal would eliminate jurisdiction over wetlands that are less than 1/2 acre if certain characteristics of the wetlands are found not to exist. Moreover, the characteristics proposed by ANR are subjective and if implemented would lead to debate over which wetlands are jurisdictional. Again, we question how ANR's proposal is clearer than the current system of wetland regulation and how taking jurisdiction over fewer wetlands is consistent with Vermont's no net loss of wetlands functions policy.

Moreover, ANR's proposal includes expanding the exemption for farming in wetlands in Vermont. Farming can have significant impacts on wetlands. At a time when we need to improve our efforts to address water pollution it does not make sense to weaken our regulatory approach to the impacts of farming on wetlands.

Consistency with Federal Wetland Review

Part of your charge is to evaluate:

“whether the exemptions under State wetlands law should be consistent or similar to the exemptions under federal wetlands law.”

Simply put, this is wrong time to be aligning our system of wetland regulation with the federal system. Recently, the Trump Administration has completed the process to repeal what is known as the Waters of the United States (WOTUS) rule. The WOTUS rule was adopted by the Obama Administration to clarify which waters, including wetlands, are subject to federal review. The rule was made necessary by a series of United States Supreme Court decisions that set forth conflicting tests for determining waters that are subject to federal jurisdiction. Under the WOTUS rule, navigable waters and waters that have a hydrologic connection to navigable waters would be subject to federal jurisdiction.

The Trump Administration has stated that it believes only waters that are navigable in fact – not tributaries to these waters or waters hydrologically connected to these waters – should trigger federal jurisdiction. This is an extremely narrow reading of federal law and the United State Supreme Court decisions on this subject that would severely limit jurisdiction over wetlands.

In our view, with the Trump Administration considering proposing a rule that would significantly limit federal jurisdiction over wetlands, this is not a time to tie Vermont's wetland jurisdiction to the federal program.

Moreover, the federal wetlands program, which is administered by the Army Corp. of Engineers, has limited staff – two people in Vermont, and relies primarily on what are known as Nationwide Permits, which cover categories of activities and involve extremely limited actual review of wetland impacts on the ground. A major benefit of the Vermont wetlands program is that it fills the gap left by the federal program, and authorizes a review of wetland impacts by trained ecologists who work to ensure that functions and values of significant wetlands are not adversely affected.

H.525 Conference Committee Language

I would like to address the issue of the meaning the following language that was added to H.525 in Conference Committee:

The Secretary (of AAFM) shall amend the required agricultural practices to include requirements for activities occurring in areas that area excluded from regulation by the Agency of Natural Resources under 10 V.S.A. § 902 because the area is used to grow food or crops in connection with farming activities.

I was in the Conference Committee when this change was made and raised concerns about the language. When I asked what the intent of the language was, I was informed that the language gave AAFM the authority to regulate wetlands that ANR has not had jurisdiction over since Vermont's wetland program was created in 1990 (there is an existing exemption in the VWR's for growing of food or crops so long as this activity has been on-going since 1990 when Vermont's wetland program was established.) In other words, the language was not intended to alter the current balance between ANR and AAFM with regard to regulating wetlands in Vermont, or expand the farming exemption that exists under the VWRs. Rather the intent of the language was to authorize AAFM to fill any gaps in the regulation of farming that impacts wetlands.

We are extremely concerned that the interpretation of the language in question as discussed at the first meeting of this Committee and in letters from Senator Starr and Representative Partridge to Secretary Tebbetts is that H.525 expanded the farming exemption under the Vermont Wetland Rules (VWR).

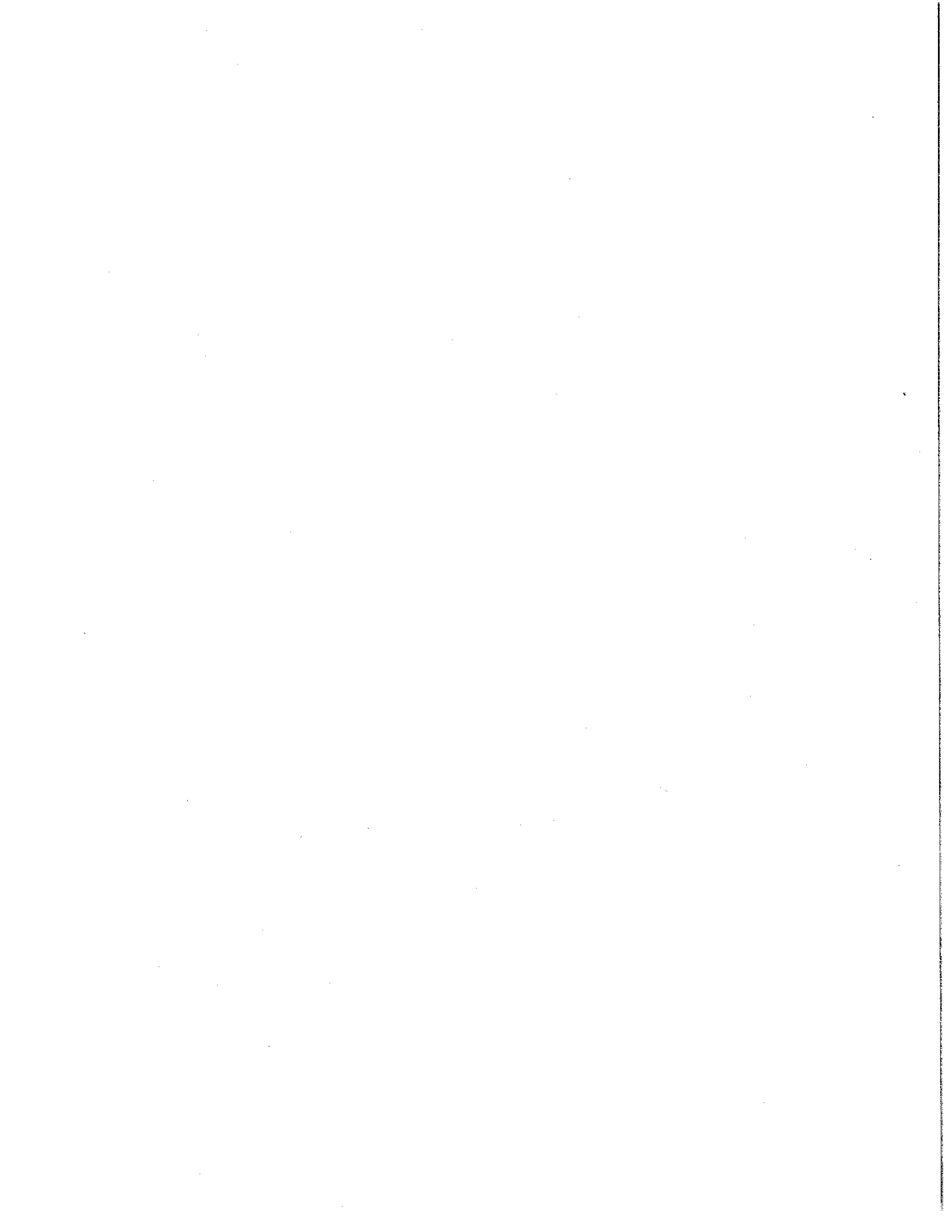
We do not agree with this interpretation of the language added to H.525 in Conference Committee. The VWRs were adopted in 1990 after going through the entire rulemaking process, including approval by the Legislative Committee on Administrative Rules (LCAR). ANR was granted authority by the Legislature to adopt rules to implement the wetland program. 10 V.S.A. § 905b. The rules have been in effect for nearly 30 years and there has never been a legal challenge the provisions in the rules that regulate farming in wetlands.

Moreover, the language added to H.525 in Conference Committee does not say anything about expanding the exemption for farming under the VWRs. As noted herein, the language appears

to address AAFM regulation of farming in wetlands where ANR does not jurisdiction over these activities.

Finally, in records I have obtained from ANR, it is clear there was confusion and concern when the language in question was inserted into H.525 in Conference Committee, and disagreement from ANR that the language broadened the farming exemption under VWRs.

I have attached these records to my testimony along with an index placing the records in context.



Index of Records Related to H.525 Language Added in Conference Committee

Doc 1 - E-mail from Marli Rupe (Agency of Natural Resources (ANR)) to Hannah Smith (ANR) and Laura Lapierre (ANR). The e-mail notes that Rep. Partridge introduced language in the Conference Committee on H.525 to address the regulation of wetlands on farms "for land not currently regulated" on farms by ANR. The e-mail further notes that language is "intended to provide clarity for farmers." The ANR staffer in Conference Committee also notes that she "was a little unsure what it (the language) actually meant." It also noteworthy that the ANR staffer did not have a copy of the language and could not find it on-line. Finally, Marli Rupe states that "we need to see the language" and suggests that Mike O'Grady be asked about the language.

Doc 2 - This is a long e-mail chain in small font (that is how the document was provided) that shows concern about what the language in question noted in H.525, referenced in Doc 1, means. Importantly, the e-mail includes a statement from Secretary Moore that "[I]n separate conversations with Rep Partridge and Sen Starr, both indicated that the intent of the language is to make clear that AAFM has responsibility (thru the RAPs) for managing and protecting wetlands on areas being used to grow food and crops (i.e. exempt from ANR jurisdiction). I specifically spoke to Sen Starr about our concerns that this language is potentially confusing, particularly given the charge to the summer legislative study committee, but he did not feel the same way. In the end, given the assurances regarding intent from the chairs of both committees, I don't think that this is a hill we need to die on."

Doc 3 - An e-mail from Laura Lapierre to Hannah Smith and Marli Rupe raising concerns about the language in question being confusing and questioning how adding the language dovetails with the work of the Legislative Committee on Wetlands.

Doc 4 - An e-mail from Laura Lapierre to Marli Rupe and Hannah Smith noting that the language "will cause headaches," noting that the language "still doesn't make sense," and that it looks like AAFM is "confirming their authority for work on land growing food or crops, which they always had."

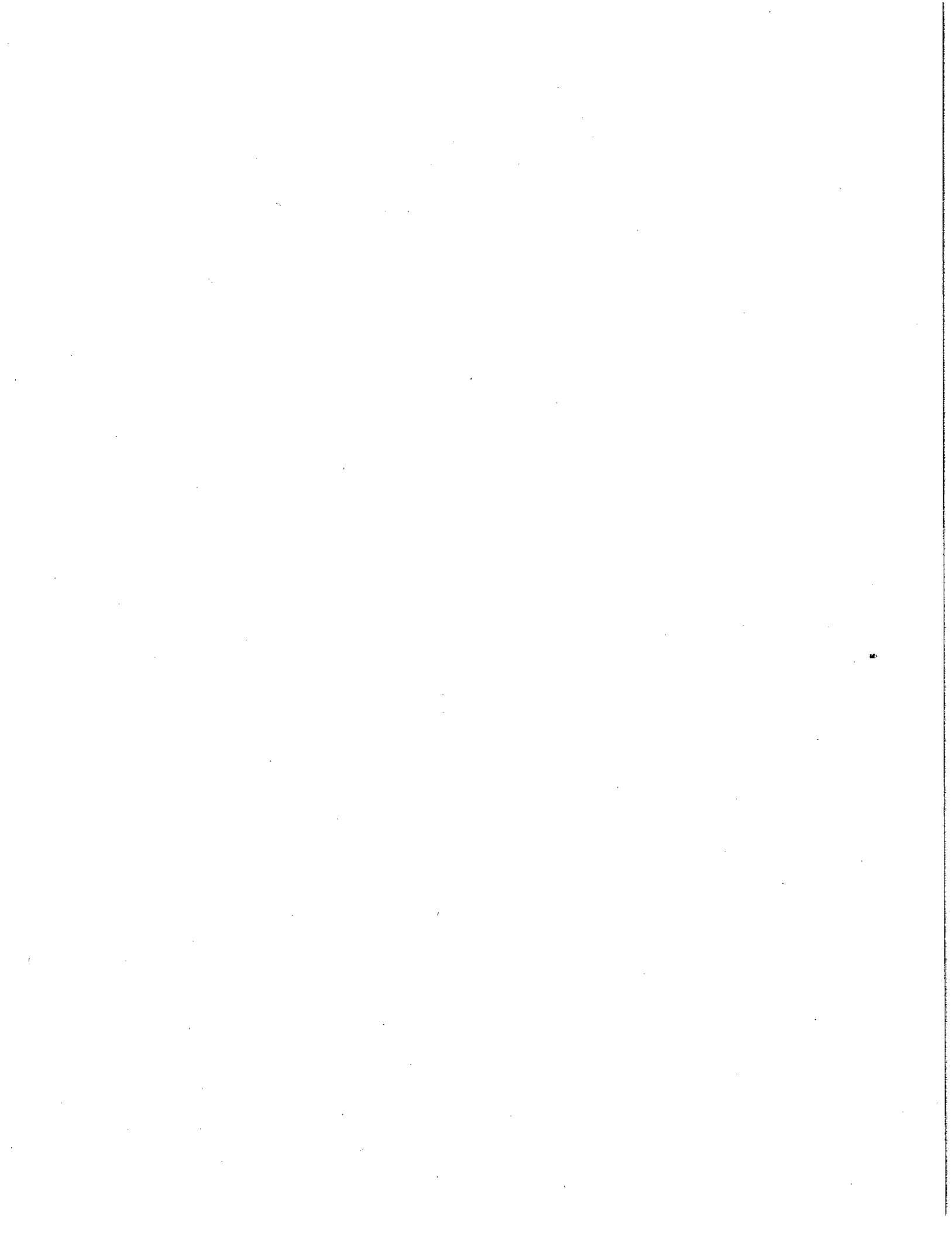
Doc 5 - An e-mail from Secretary Moore to Senator Starr expressing concern that the language in question is confusing and notes that even with the language "ANR maintains statutory jurisdiction over wetlands, and any attempt to redefine areas exempt from ANR's wetland jurisdiction through the RAPs would conflict with that statutory authority."

Doc 6 - An e-mail from Jackie Folsom (VT Farm Bureau) to Marli Rupe stating that she "can't figure out what that insertion into 525 is supposed to accomplish."

Doc 7 - An e-mail from Marli Rupe to Secretary Moore noting that Rep. Partridge and Senator Starr wrote a letter to Secretary Tebbetts that appears to state that the intent of the language in question added to H.525 authorizes the Agency of Agriculture to regulate farming in all wetlands - not just wetlands on farms that are currently exempt from ANR jurisdiction. The e-mail expresses concern about the Partridge/Starr interpretation of the language.

Doc 8 – The June 17, 2019 letter from Rep. Partridge and Senator Starr to Secretary Tebbetts referenced on Doc 7.

Doc 9 – An e-mail from Secretary Moore to Marli Rupe asking Ms. Rupe to “sit tight” with regard to the Partridge/Starr letter and noting that Secretary Moore and Deputy Secretary Walke “are actively working on this.”



Doc 1

From: Rupe, Marli
Sent: Wednesday, May 22, 2019 11:07 AM
To: Smith, Hannah; Lapierre, Laura
Subject: FW: H. 525
Attachments: Ag Conference. H 525. 5.22.docx

Hi – notes from Beth this morning, but limited detail. Hannah, I think we need to see this language that the Chair suggested. Are you able to ask MOG about this?
Thanks -Marli

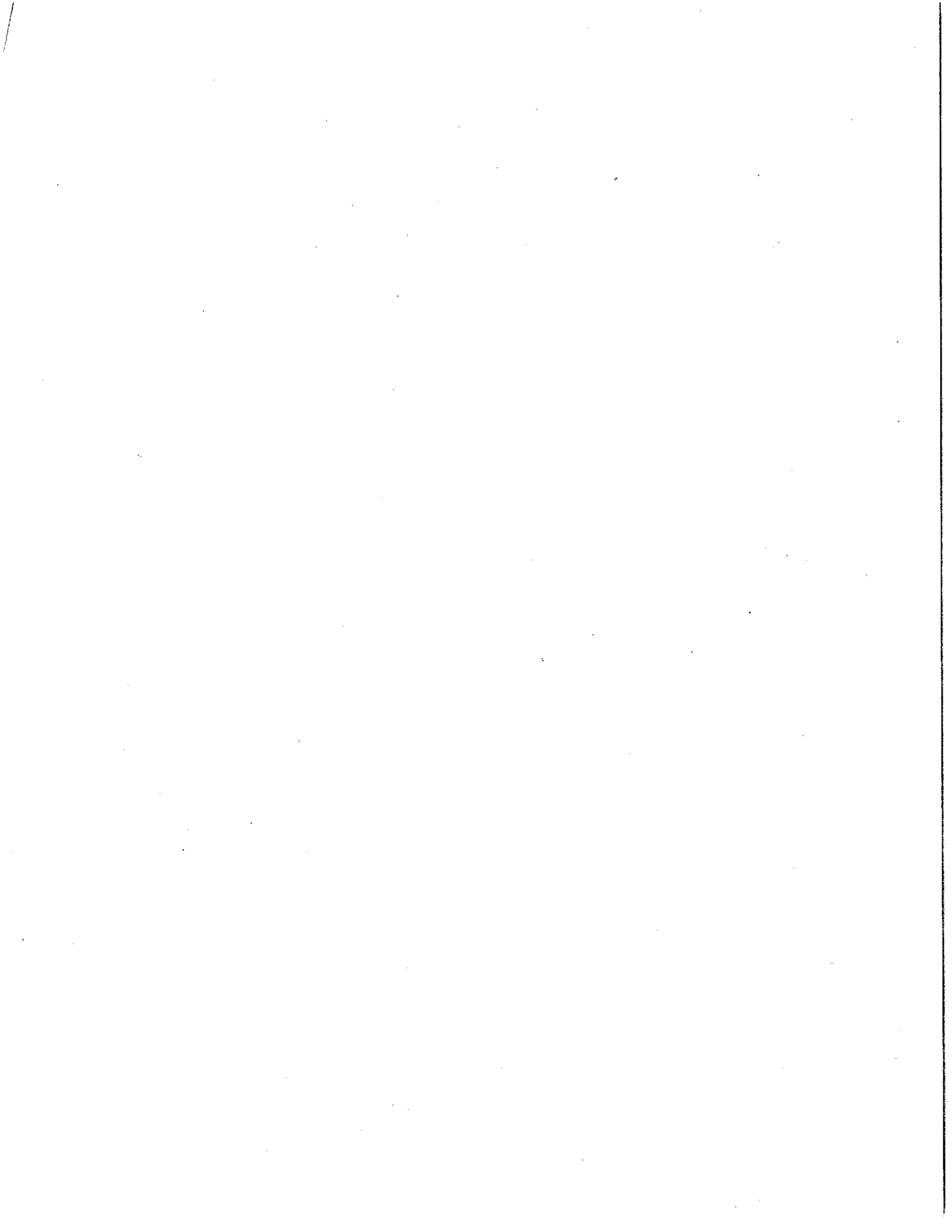
From: Bannar, Elizabeth <Elizabeth.Bannar@vermont.gov>
Sent: Wednesday, May 22, 2019 10:58 AM
To: Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: H. 525

Hi Marli,

The conference committee was very quick today. They discussed the sign to hang on farms and selling raw milk. Then Rep. Partridge introduced language for Section 7 to amend RAP's for land not currently regulated. It was intended to provide clarity for farmers but I was a little unsure of what it actually meant. You can see what the language said in my notes, the new section looked like it was about three sentences long. I can't find a copy of it online but I will see if it pops up later. The other committee members all agreed to it with no discussion.

Beth

Beth Bannar
Legislative Assistant, DEC
315 657 6011
elizabeth.bannar@vermont.gov



From: Rupe, Marli
Sent: Thursday, May 23, 2019 9:30 AM
To: Lapierre, Laura; Smith, Hannah
Cc: Kamman, Neil
Subject: RE: new language in H 525 - appears to relate to wetlands

Believe me, opening the RAPs is not going to happen quickly. Took well over a year last time, and I know AAFM will want to combine any reopening with other RAP changes, so this will happen well after the end of the study committee schedule. I'd be surprised if it happened next session. AAFM will push to wait.

From: Lapierre, Laura <Laura.Lapierre@vermont.gov>
Sent: Thursday, May 23, 2019 8:57 AM
To: Smith, Hannah <Hannah.Smith@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>
Cc: Kamman, Neil <Neil.Kamman@vermont.gov>
Subject: RE: new language in H 525 - appears to relate to wetlands

It sounds like that is the case from Julie's email. Could we get Rep. Partridge to put in writing her intent for the day the RAP gets to ICAR? It would be better if the intent translated better in the actual bill, but here we are last day!
Is there a timeline in there for when the RAP would need to be revised? Maybe it'll wait until after next session for our statute changes (which may or may not use the language "growing food or crop").

Laura

From: Smith, Hannah <Hannah.Smith@vermont.gov>
Sent: Thursday, May 23, 2019 8:46 AM
To: Rupe, Marli <Marli.Rupe@vermont.gov>; Lapierre, Laura <Laura.Lapierre@vermont.gov>
Cc: Kamman, Neil <Neil.Kamman@vermont.gov>
Subject: RE: new language in H 525 - appears to relate to wetlands

It's not an ideal situation, that AAFM would be revising their rules to address wetlands on areas used to grow food or crops while the legislature is simultaneously reviewing the statutory language itself (via summer study committee and legislation still on the wall). But, the rulemaking process, through ICAR and LCAR, is intended to prevent any agency from adopting a rule that conflicts with either another agency's rules or statute. I wonder if this is perhaps a final attempt by the legislators to force ANR and AAFM to work together to address our concurrent jurisdiction without a statutory overhaul.

Hannah

From: Rupe, Marli <Marli.Rupe@vermont.gov>
Sent: Thursday, May 23, 2019 8:33 AM
To: Lapierre, Laura <Laura.Lapierre@vermont.gov>; Smith, Hannah <Hannah.Smith@vermont.gov>
Cc: Kamman, Neil <Neil.Kamman@vermont.gov>
Subject: RE: new language in H 525 - appears to relate to wetlands

I admit I'm pretty surprised by it, if that is actually the intention. Not really the approach CP has been taking, but we'll see how it works out.
I wonder how much input we'll have to the RAPs tho - if we actually have no jurisdiction on land growing food or crops, AAFM may accept our input and choose not to use it. We'll have to really pay attention but I'm concerned.

Thanks - marli

From: Lapierre, Laura <Laura.Lapierre@vermont.gov>
Sent: Thursday, May 23, 2019 7:06 AM
To: Moore, Julie <Julie.Moore@vermont.gov>; Boedecker, Emily <Emily.Boedecker@vermont.gov>; Smith, Hannah <Hannah.Smith@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>; Chapman, Matt <Matt.Chapman@vermont.gov>
Cc: Kamman, Neil <Neil.Kamman@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>; Walke, Peter <Peter.Walke@vermont.gov>
Subject: RE: new language in H 525 - appears to relate to wetlands

Thank you for following up and providing us with more context, Julie. As Hannah explained to me yesterday, we will have an opportunity to ensure language added to the RAPs is consistent with our law in the rule making process. So I agree it is not language to fight real hard about, although it is not ideal.
Regards,
Laura

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From: Moore, Julie
Sent: Thursday, May 23, 2019 5:40:07 AM
To: Boedecker, Emily; Smith, Hannah; Rupe, Marli; Chapman, Matt
Cc: Lapierre, Laura; Kamman, Neil; Rupe, Marli; Walke, Peter
Subject: RE: new language in H 525 - appears to relate to wetlands

In separate conversations with Rep Partridge and Sen Starr, both indicated that the intent of the language is to make clear that AAFM has responsibility (thru the RAPs) for managing and protecting wetlands on areas being used to grow food and crops (i.e. exempt from ANR jurisdiction). I specifically spoke with Sen Starr about our concerns that this language is potentially confusing, particularly given the change to the summer legislative study committee, but he did not feel the same way.

In the end, given the assurances regarding intent from the chairs of both committees, I don't think that this is a hill we need to die on. My understanding (I am unable to get on the legislative website right now) is that H.525 will come to the Senate floor today for final action.

Julie

From: Boedecker, Emily <Emily.Boedecker@vermont.gov>
Sent: Wednesday, May 22, 2019 3:57 PM
To: Smith, Hannah <Hannah.Smith@vermont.gov>; Moore, Julie <Julie.Moore@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>; Chapman, Matt <Matt.Chapman@vermont.gov>
Cc: Lapierre, Laura <Laura.Lapierre@vermont.gov>; Kamman, Neil <Neil.Kamman@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: RE: new language in H 525 - appears to relate to wetlands

Thanks Hannah, Matt I just had a similar conversation as well.
Will be very interested to hear what Matt and Julie are able to deduce about intent.

Emily Boedecker, Commissioner
Vermont Department of Environmental Conservation
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Mondak, VT 05602
emily.boedecker@vermont.gov
(802) 828-1556 (office)
(802) 622-4039 (cell)

From: Smith, Hannah <Hannah.Smith@vermont.gov>
Sent: Wednesday, May 22, 2019 3:56 PM
To: Moore, Julie <Julie.Moore@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>; Chapman, Matt <Matt.Chapman@vermont.gov>
Cc: Boedecker, Emily <Emily.Boedecker@vermont.gov>; Lapierre, Laura <Laura.Lapierre@vermont.gov>; Kamman, Neil <Neil.Kamman@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: RE: new language in H 525 - appears to relate to wetlands

Matt and I just talked briefly- the language is indeed confusing. As I read it, it obligates the Agency of Ag to re-open the RAPs to condition activities taking place in areas currently exempt from ANR's wetlands permitting jurisdiction. What those conditions might include is unclear; whether they would require measures to protect wetlands, or to redefine the activities allowed in the wetland. As written, the language is vague and creates confusion, and sets up a potential conflict between the Agencies during the RAP-revision process since ANR maintains statutory jurisdiction over wetlands, and any attempt to redefine areas exempt from ANR's wetland jurisdiction through the RAPs would conflict with that statutory authority.

As I understand, Matt and Julie are reaching out to legislators and staff working on the bill.

Thanks,
Hannah

From: Moore, Julie <Julie.Moore@vermont.gov>
Sent: Wednesday, May 22, 2019 3:07 PM

To: Rupe, Marli <Marli.Rupe@vermont.gov>; Smith, Hannah <Hannah.Smith@vermont.gov>; Chapman, Matt <Matt.Chapman@vermont.gov>
Cc: Boedecker, Emily <Emily.Boedecker@vermont.gov>; Lapiere, Laura <Laura.Lapiere@vermont.gov>; Kamman, Neil <Neil.Kamman@vermont.gov>
Subject: Re: new language in H 525 - appears to relate to wetlands

Let me and Matt see what we can figure out.

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From: Rupe, Marli
Sent: Wednesday, May 22, 2019 2:18:00 PM
To: Smith, Hannah
Cc: Moore, Julie; Boedecker, Emily; Lapiere, Laura; Kamman, Neil
Subject: new language in H 525 - appears to relate to wetlands

Hi -- see Section 6 (c) -- bottom of p. 17. New language that I believe is a result of Rep. Partridge's comment yesterday about wanting clarification for farmers of what they can and can't do in wetlands. However, the language is very confusing -- would appreciate any clarity from you, Hannah. Beth was in the room but said they simply added the language as is, with no discussion at all. MDG was not in the room at the time, but was handed it when he arrived and asked to put it in. Ryan Patch was in the room and had no comment.

<https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Agriculture/Bills/H.525%20AAFM%20housekeeping/Drafts%20Amendments%20Summary/H.525~Mike%20Grady~Final%20Report%20of%20Committee%20of%20Conference-5-22-2019.pdf>

marli



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Doc 3

From: Lapierre, Laura
Sent: Wednesday, May 22, 2019 2:31 PM
To: Rupe, Marli; Smith, Hannah
Cc: Moore, Julie; Boedacker, Emily; Kamman, Neil
Subject: RE: new language in H 525 - appears to relate to wetlands

Categories: HS25FOI

I agree that the language is confusing and I also feel that it is disingenuous to have this requirement in the same bill that asks for a summer committee to talk about the extent of the exemption. Here is the language copy/pasted below. Where might we have the opportunity to opine on this?

Regards,
Laura

(c) The Secretary shall amend the required agricultural practices to include requirements for activities occurring in areas that are excluded from regulation by the Agency of Natural Resources under 10 V.S.A. § 502 because the area is used to grow food or crops in connection with farming activities.

From: Rupe, Marli <Marli.Rupe@vermont.gov>
Sent: Wednesday, May 22, 2019 2:18 PM
To: Smith, Hannah <Hannah.Smith@vermont.gov>
Cc: Moore, Julie <Julia.Moore@vermont.gov>; Boedacker, Emily <Emily.Boedacker@vermont.gov>; Lapierre, Laura <Laura.Lapierre@vermont.gov>; Kamman, Neil <Neil.Kamman@vermont.gov>
Subject: new language in H 525 - appears to relate to wetlands

Hi - see Section 6 (c) - bottom of p. 17. New language that I believe is a result of Rep. Partridge's comment yesterday about wanting clarification for farmers of what they can and can't do in wetlands. However, the language is very confusing - would appreciate any clarity from you, Hannah. Bath was in the room but said they simply added the language as is, with no discussion at all. MOG was not in the room at the time, but was handed it when he arrived and asked to put it in. Ryan Patch was in the room and had no comment.

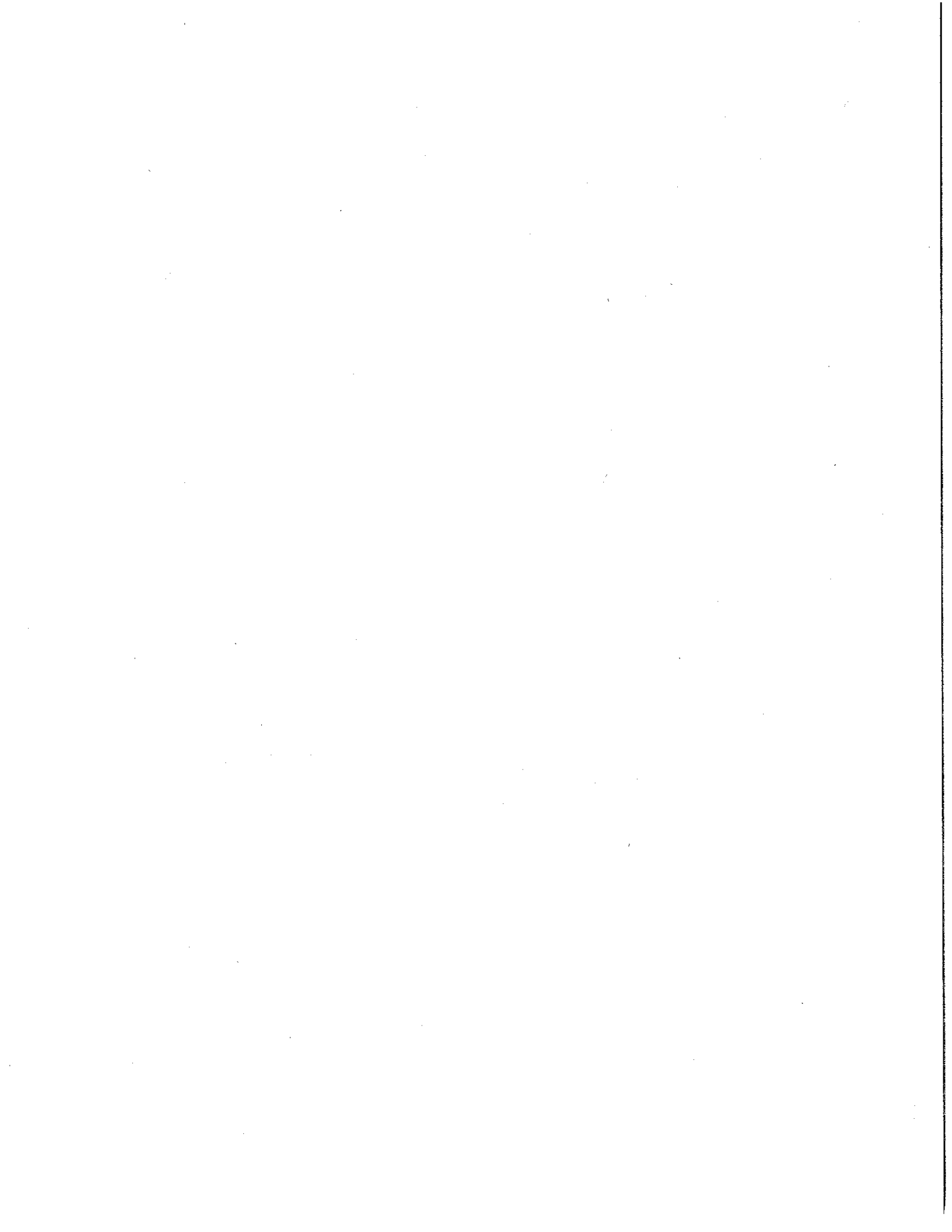
<https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Agriculture/Bills/H.525%20AFM%20Housekeeping/Drafts/4620Amendments%20Summary/H.525-Mike%20O'Grady-Final%20Report%20of%20Committee%20on%20Conference-5-22-2019.pdf>

marli



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Doc 4

From: Lapierre, Laura
Sent: Tuesday, May 28, 2019 9:34 AM
To: Rupe, Marli; Smith, Hannah
Subject: RE: S.160?

Wishful thinking on my behalf then on the RAP language. This will cause headaches.
Curious to see who ends up in the summer committee.

Laura

From: Rupe, Marli <Marli.Rupe@vermont.gov>
Sent: Tuesday, May 28, 2019 8:47 AM
To: Smith, Hannah <Hannah.Smith@vermont.gov>; Lapierre, Laura <Laura.Lapierre@vermont.gov>
Subject: RE: S.160?

Yup, the RAP amendment is in H 525 – on p 1924 of the link Hannah sent. That's the version that was approved by the conf committee so it's done. Here's the final language. Still doesn't make sense to me and I suspect there are misunderstandings about it over there. Looks like they think they are confirming their authority for work on land growing food or crops, which they always had. Odd.

(c) The Secretary shall amend the required agricultural practices to include requirements for activities occurring in areas that are excluded from regulation by the Agency of Natural Resources under 10 V.S.A. § 902 because the area is used to grow food or crops in connection with farming activities.

From: Smith, Hannah <Hannah.Smith@vermont.gov>
Sent: Friday, May 24, 2019 4:25 PM
To: Lapierre, Laura <Laura.Lapierre@vermont.gov>
Cc: Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: RE: S.160?

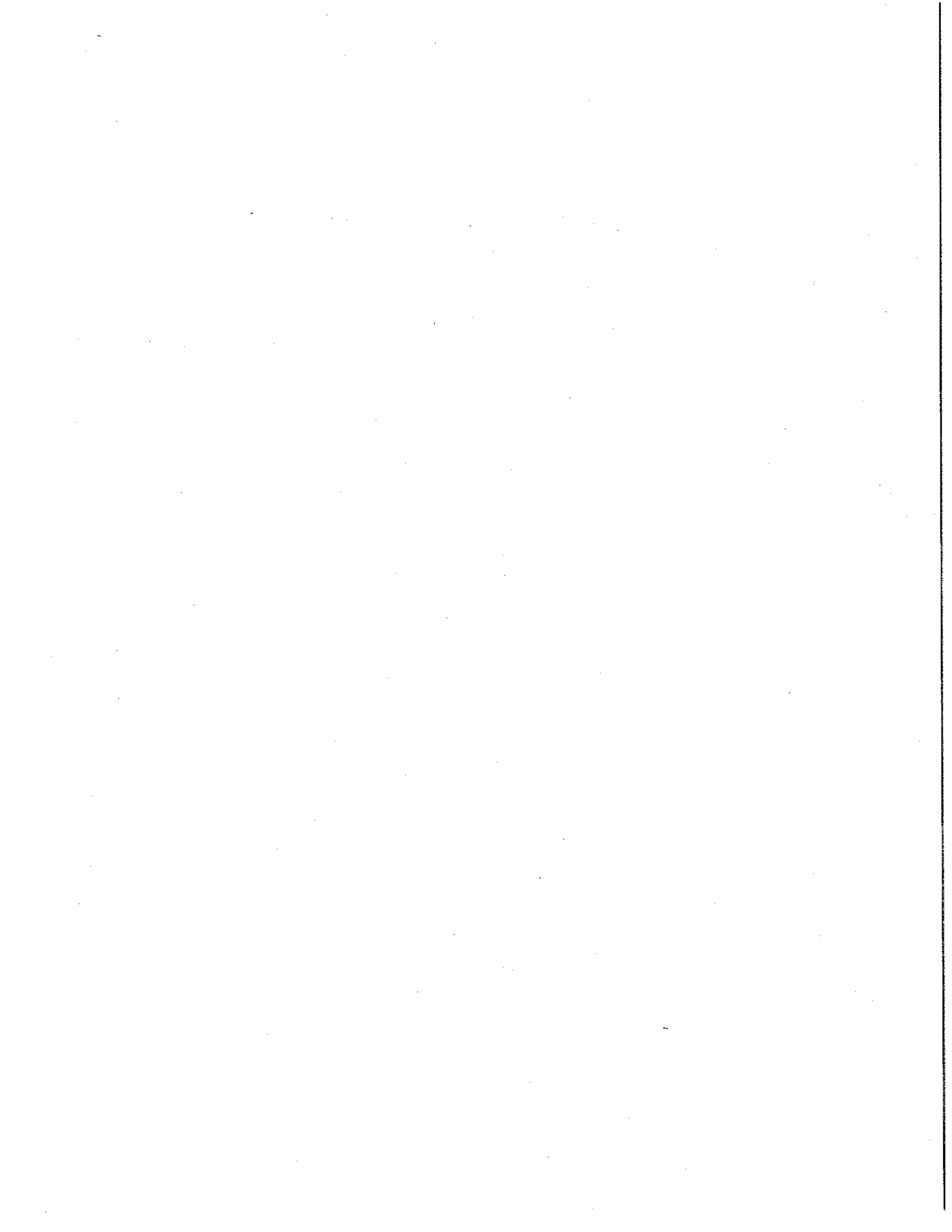
The RAP amendment may not have been adopted. It does appear that H.525, as adopted, contains the summer study committee language: <https://legislature.vermont.gov/Documents/2020/Docs/JOURNAL/hj190523.pdf#page=9>

From: Lapierre, Laura <Laura.Lapierre@vermont.gov>
Sent: Friday, May 24, 2019 3:44 PM
To: Smith, Hannah <Hannah.Smith@vermont.gov>; Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: S.160?

I'm no expert on looking stuff up, but it looks like S.160 house proposal of amendment has no language in it about the RAP addition, and no summer committee. The version of H.525 that I can see has nothing about wetlands in it, besides ecosystem services. Are they done? Is this what we ended up with?

<https://legislature.vermont.gov/Documents/2020/Docs/BILLS/S-0160/S-0160%20House%20proposal%20of%20amendment%20Official.pdf>

Laura



Doc 5

To: Senator Bobby Starr
Subject: H.525

Good afternoon, Sen. Starr.

I am hoping we might have a chance to connect briefly on the language that was added to H.525 during this morning's conference committee to Sec. 6. 6 V.S.A. § 4810a (c)

I am concerned that the language is confusing, including the timing which would seem to have AAFM re-open the RAPs at the same time this summer that the Legislative Study Committee

to condition activities taking place in areas currently exempt from ANR's wetlands permitting jurisdiction. What those conditions might include is unclear; whether they would require measures to protect wetlands, or to redefine the activities allowed in the wetland. As written, the language is vague and creates confusion, and sets up a potential conflict between the Agencies during the RAP-revision process since ANR maintains statutory jurisdiction over wetlands, and any attempt to redefine areas exempt from ANR's wetland jurisdiction through the RAPs would conflict with that statutory authority.

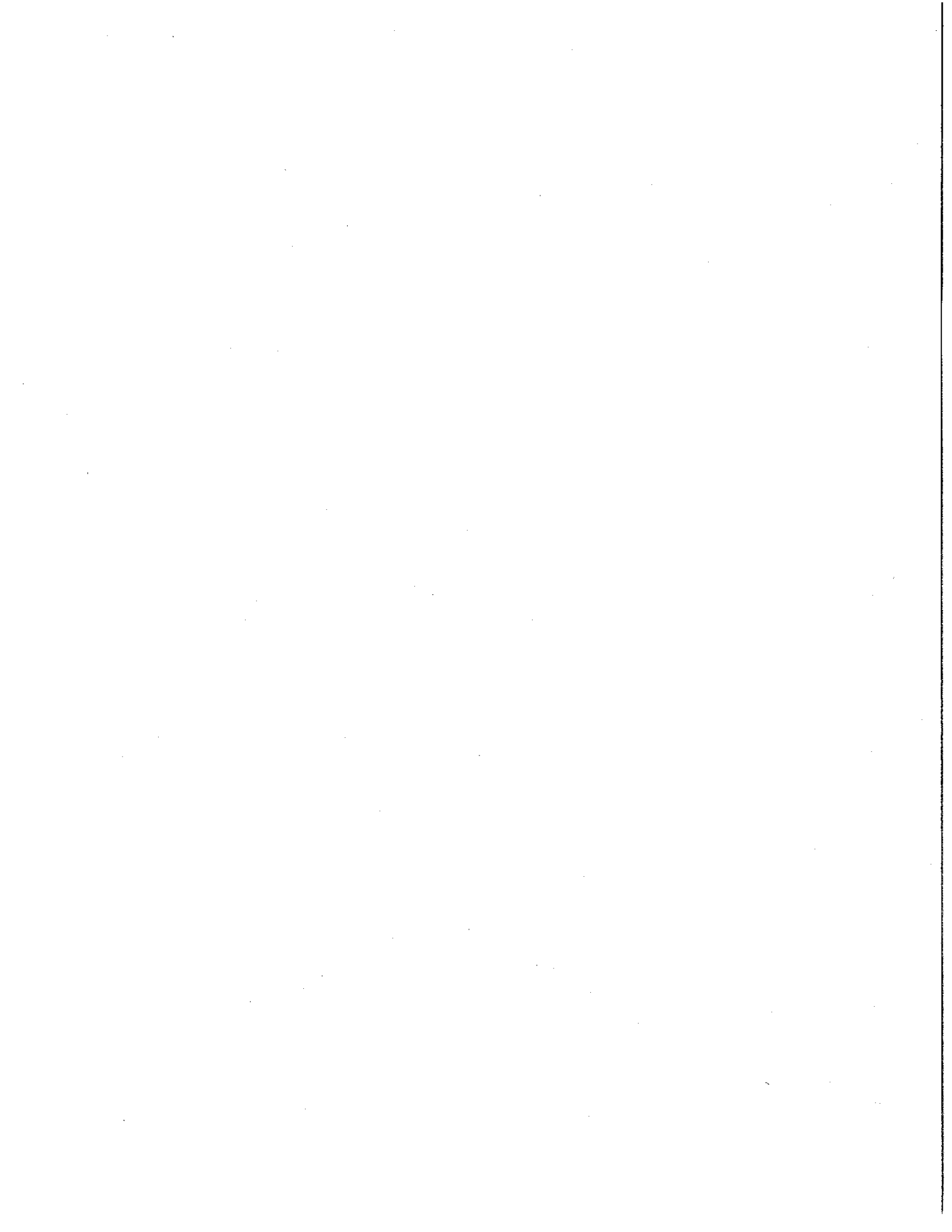


Julia S. Moore, P.E., Secretary
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901

[phone] 802-828-1294
[email] julie.moore@vermont.gov

<http://anr.vermont.gov/>

Respect. Protect. Enjoy.



Doc 6

From: Jackie Folsom <crkdbrks@aol.com>
Sent: Friday, June 21, 2019 9:14 AM
To: Rupe, Marli
Subject: Re: Brandon issue

Marli - thanks for the info - are you around today? I can't figure out what that insertion into 525 is supposed to accomplish - Jackie

-----Original Message-----

From: Rupe, Marli <Marli.Rupe@vermont.gov>
To: Jackie Folsom <crkdbrks@aol.com>
Sent: Fri, Jun 21, 2019 9:11 am
Subject: RE: Brandon issue

Hey - thanks for reaching out. Absolutely you can use anything I wrote, but I'm also going to send you an email that I got from Laura Lapierre (wetland program mgr) with docs that support it all. I think the 2 most important points are:

1. This is community driven - DEC did not request this and is only providing support and technical info to the Brandon group. This was their idea.
 2. Agriculture can still continue in the ways it is already allowed per wetland rules -activities related to growing food or crops.
- Hopefully the docs help (next email) - feel free to email/call me or Laura.

Sorry to hear you were at a funeral. Was really glad Lyn reached out and told her so.

Maybe we can chat about 525?

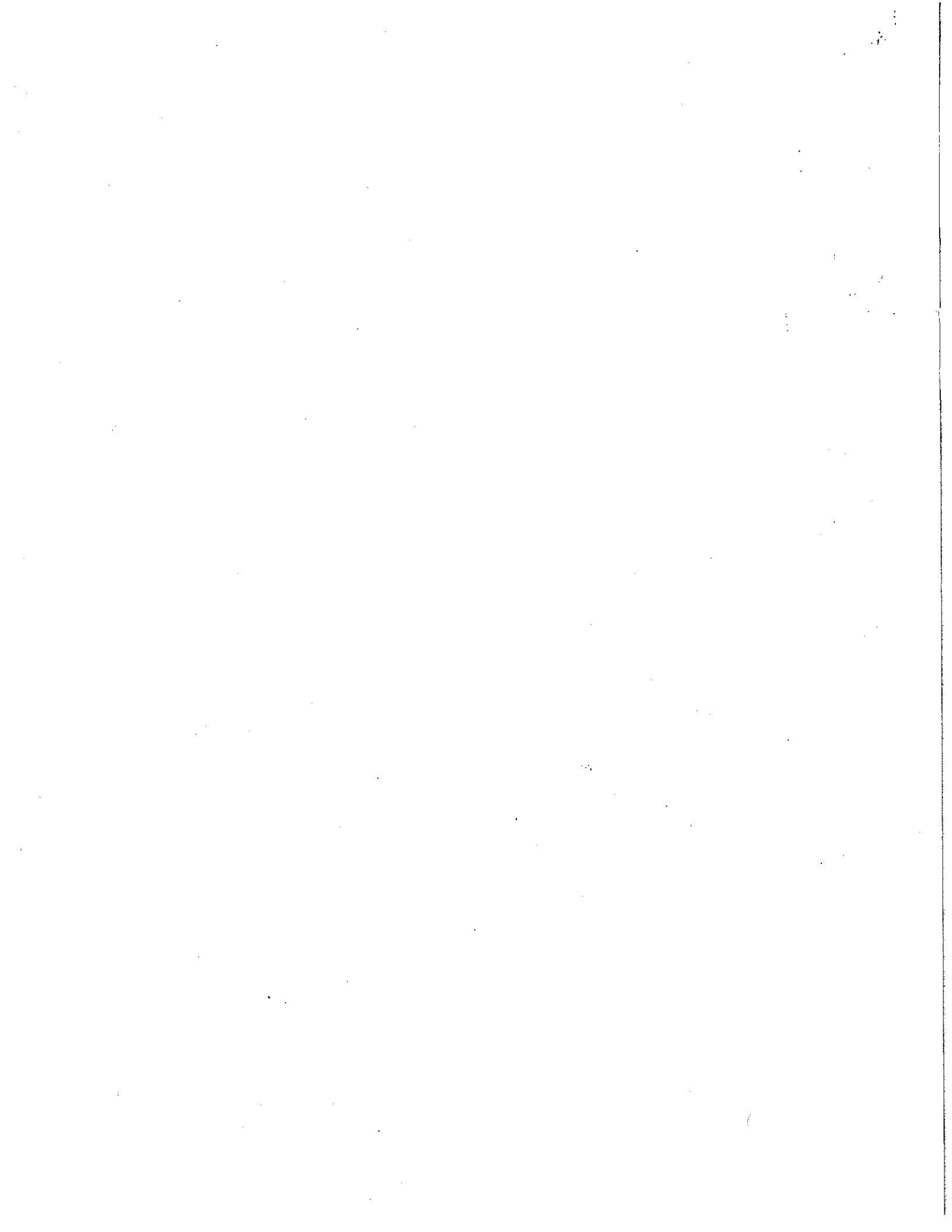
Thanks -marli

From: Jackie Folsom <crkdbrks@aol.com>
Sent: Friday, June 21, 2019 8:50 AM
To: Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: Brandon issue

Hey Marli - thanks for responding to Lyn - I had to head back to Ohio on Sunday for a funeral and Lyn had called and wanted answers to some questions about what is going on with a "wetlands grab" (that's what Ben Lawton is calling it).

Ben called me last week just before I left and sent me an article from the Brandon paper (which I haven't read yet) and then proceeded to call me several times when I was in Ohio.

I'm doing another UTGD today or tomorrow (specifically on H.525 with the mysterious additional language) and would like your permission to put the information you sent to Lyn in the report, so others will be updated as to what is legal. Hope all is well - Jackie



Doc 7

From: Rupe, Marli
Sent: Monday, July 8, 2019 9:49 AM
To: Moore, Julie
Subject: wetlands letter from legislators to Anson

Hi - Julie, I suspect you already have this. It's the letter sent to Anson from Rep. Partridge and Sen Starr regarding the late language added to H 525 for an amendment to the RAPs to include requirements for activities occurring in areas that are excluded from regulation by ANR. I have a hard copy - any objection to me forwarding it to others (Emily, Neil, Laura L, Matt, John, Hannah) or have you already? I'm concerned with the final statement - that they (legislators) believe that the language clearly authorizes AAFM to regulate farming in wetlands and buffers - and it appears to mean all wetlands.

Any word about the start of this study group?

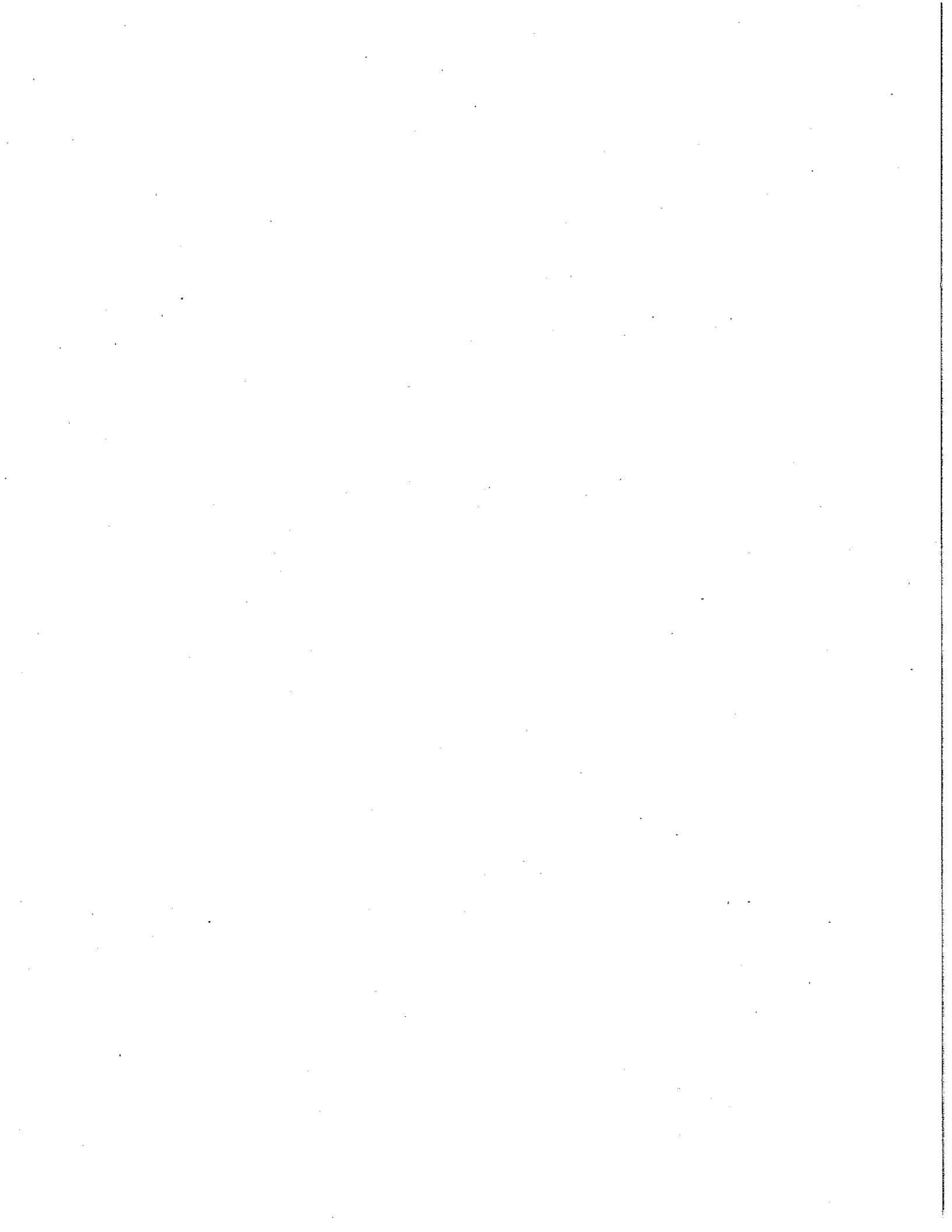
Thanks -marli

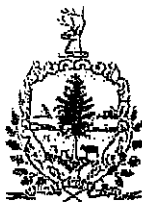
-----Original Message-----

From: noreply.watershedmngmt@state.vt.us <noreply.watershedmngmt@state.vt.us>
Sent: Monday, July 8, 2019 9:51 AM
To: Rupe, Marli <Marli.Rupe@vermont.gov>
Subject: Message from "NL-M207-RICOH-MPC6503"

This E-mail was sent from "NL-M207-RICOH-MPC6503" (MP C6503).

Scan Date: 07.08.2019 09:50:41 (-0400)
Queries to: noreply.watershedmngmt@state.vt.us





STATE OF VERMONT
GENERAL ASSEMBLY

Doc 8

June 17, 2019

Secretary Anson Tebbetts
Agency of Agriculture, Food
and Markets
116 State Street
Montpelier, VT 05620-2901

Dear Secretary Tebbetts:

We are writing to you regarding language in H.525 of 2019 that requires the Agency of Agriculture, Food and Markets (AAFM) to amend the required agricultural practices (RAPs) to include requirements for activities occurring "in areas that are excluded from regulation by the Agency of Natural Resources under 10 V.S.A. § 902 because the area is used to grow food or crops in connection with farming activities." Apparently, you received inquiries as to what the General Assembly intended when it included this language in H.525. This letter should clarify the purpose of that language and how AAFM should proceed with amendments to the RAPs.

A. Overview of Statute and Rules

The language in H.525 is intended to clarify which State regulatory agency has State jurisdiction over farming activities occurring in wetlands. Under 10 V.S.A. chapter 37, the Agency of Natural Resources (ANR) regulates activity in significant wetlands and the buffer zones of significant wetlands. However, 10 V.S.A. § 902(5) defines a wetland as follows:

"Wetlands" means those areas of the State that are inundated by surface or groundwater with a frequency sufficient to support significant vegetation or aquatic life that depend on saturated or seasonally saturated soil conditions for growth and reproduction. Such areas include marshes, swamps, sloughs, potholes, fens, river and lake overflows, mud flats, bogs, and ponds, but excluding such areas as grow food or crops in connection with farming activities. (emphasis added)

Thus, by statute, certain areas used for farming are excluded from ANR's wetlands jurisdiction.

When we reviewed this language with AAFM, ANR, legislative counsel, and other interested parties this legislative session, it became clear that there is ambiguity, if not direct disagreement, regarding the meaning of the exclusion of areas used for farming from the definition of wetlands. This ambiguity is furthered by ANR's wetlands rules that provide that "[t]he farming exemption shall apply to all areas used to grow food or crops in connection with farming activities including areas in ordinary rotation, as of the effective date of these rules." Courts have interpreted this language to mean that an area qualifies for the "farming exemption" only if it has been in continuous use for farming since adoption of the original wetlands rules in 1990.¹

¹ See, e.g., Agency of Natural Resources v. McGee, 203 Vt. 115, 119 (2016).

In addition to the “farming exemption” under statute and rules, ANR’s rules also provide that areas that grow food or crops in connection with farming are an “allowed use” if certain conditions are met. One condition for the “farming allowed use” is that the growing of food or crops must be conducted “in compliance with” the most recent RAPs adopted by AAFM. But if statute excludes from ANR’s jurisdiction areas that grow food or crops from the definition of “wetlands,” does ANR have authority to designate farming as an allowed use?

B. Case Law Interpreting the “Farming Exemption” and the “Farming Allowed Use”

Vermont courts have attempted to address this issue,² but with no discussion of ANR’s authority to adopt the “farming allowed use” and, in our opinion, with little clarity as to the distinction between the “farming exemption” and the “farming allowed use.” For example, in *Agency of Natural Resources v. McGee*, the Vermont Supreme Court held that it did not need to review whether an activity was farming because it was clear that the activity was not continuous since 1990. However, the Court held that the activity did not qualify as a “farming allowed use” because the activity at issue was dredging or filling a wetland, not the alleged ongoing farming.

But, in the Environmental Court decision in *Agency of Natural Resources v. McGee*, the Environmental Court held that the “farming exemption is jurisdictional because land that has been continuously farmed since 1990 is, by definition, not a wetland, and therefore activities on that land are beyond the scope of the Wetland Rules.”³ The Environmental Court attempted to distinguish the “farming exemption” from the “farming allowed use” by stating that the “allowed use” was narrower as it “allows certain agricultural activities to take place in a wetland without a permit, but does not take the wetland out of the scope of the Wetland Rules altogether.”

Under these decisions, only land continuously farmed since 1990 could ever qualify for the “farming exemption.” But, the statutory exclusion of land used to grow food or crops from the definition of wetland does not include the 1990 continuous farming provision. The source of the continuous farming requirement is ANR’s rules. As the Environmental Court noted, the “farming exemption” is jurisdictional, and areas covered by it are beyond the scope of the Wetlands Rules. Thus, following this rationale, it can be argued that the 1990 continuous farming provision derived from the Wetland Rules should not apply to the statutory “farming exemption” because ANR does not have jurisdiction over areas used to grow food or crops in connection with farming.

C. H.525 Clarification of Regulatory Authority

Consequently, there appeared to us ambiguity as to which regulatory agency had authority and the extent of that authority under State law to regulate farming in wetlands. It seems clear that under statute ANR does not have wetlands jurisdiction over areas used to grow food or crops in connection with farming. However, prior to H.525, nothing in statute clearly provided who had regulatory authority over farming in wetlands.

In our opinion, AAFM should regulate farming in wetlands, and H.525 is intended to clearly provide AAFM with this authority. AAFM traditionally regulates almost every aspect of farming in Vermont. Whether the farming involves agricultural practice, animal health, plant health, or agricultural water quality, the General Assembly has authorized AAFM to regulate the

² See, *Secretary, Vermont Agency of Natural Resources v. Irish*, 169 Vt. 407 (1999); *Agency of Natural Resources v. McGee*, 203 Vt. 115, 119 (2016); and *Agency of Natural Resources v. McGee* (Env. Div., Oct. 9, 2015).

³ *Agency of Natural Resources v. McGee* (Env. Div., Oct. 9, 2015) at p.5.

activity. H.525 authorizes AAFM to regulate farming as defined by the RAPs that occurs in a wetland and its buffer.

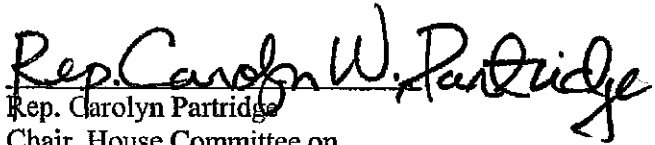
We believe that the plain language of H.525 clearly provides the General Assembly's intent to authorize AAFM to regulate farming in wetlands. This letter expounds on the language in H.525 and should address any question you may receive about the intent of our committees when we added the language in H.525. In conclusion, H.525 Sec. 6 was intended to authorize AAFM to adopt requirements under the RAPs for farming occurring in areas that ANR lacks jurisdiction over because the areas are used to grow food or crops in connection with farming.

Please let us know if you need additional information.

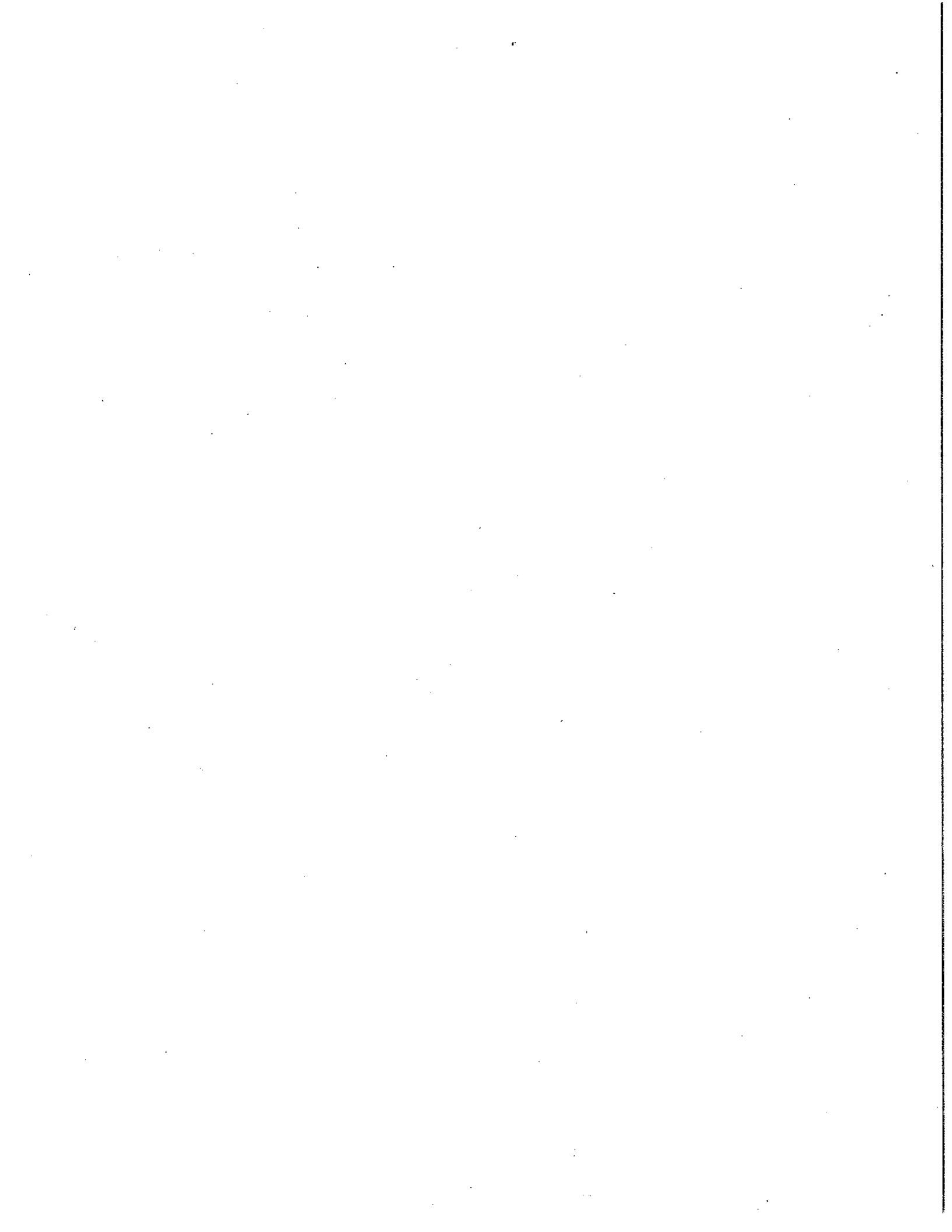
Sincerely,



Sen. Robert Starr
Chair, Senate Committee on
Agriculture



Rep. Carolyn Partridge
Chair, House Committee on
Agriculture and Forestry



Doc 9

From: Moore, Julie
Sent: Monday, July 8, 2019 9:53 AM
To: Rupe, Marli
Subject: RE: wetlands letter from legislators to Anson

Please sit tight. Peter and I are actively working on this.

Can you tell me where you got the hard copy from? Just curious...

-----Original Message-----

From: Rupe, Marli <Marli.Rupe@vermont.gov>
Sent: Monday, July 8, 2019 9:49 AM
To: Moore, Julie <Julie.Moore@vermont.gov>
Subject: wetlands letter from legislators to Anson

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Any word about the start of this study group?

Thanks -marli

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From: noreply.watershedmngmt@state.vt.us <noreply.watershedmngmt@state.vt.us>
Sent: Monday, July 8, 2019 9:51 AM
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